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SUPREME COURT, U.S.
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No. 337

In the Supreme Court of the United States

October Term, 1959

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

The Appellants, St. Johns Motor Express Co., James J. Williams, Inc., and Consolidated Freightways, Inc. (hereinafter "the Appellants"), appeal from the judgment of the United States District Court for the District of Oregon, entered April 27, 1959, sustaining and confirming orders of the Interstate Commerce Commission (hereinafter "the Commission"), and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge district court for the District of Oregon, filed April 27, 1959, is as yet unreported. A copy of the opinion is set forth in Appendix A hereto.

The Commission's report which gave rise to the Court's order sustaining and confirming it was entered in proceedings entitled Everts' Commercial Transport, Inc., Extension—Richmond, and is printed at 78 M.C.C. 717.

JURISDICTION

This suit was brought under 28 U.S.C. 1336 to set aside and enjoin enforcement of the Commission's final orders in the above-described proceeding. The judgment of the District Court was entered April 27, 1956, and the Appellant's Notice of Appeal was filed in the District Court on June 24, 1959.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following cases: *American Trucking Assns. v. United States*, 344 U.S. 298; *Frozen Food Express v. United States*, 351 U.S. 40; *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49.

QUESTIONS PRESENTED

1. Must the Interstate Commerce Commission consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability to existing carriers to maintain a safe, adequate economical and efficient service?

2. Is it a violation of the due process clause of the Constitution of the United States for the Interstate Commerce Commission in deciding a proceeding to predicate findings and conclusions upon evidence not of record in the subject proceeding?

3. May the Interstate Commerce Commission in deciding a proceeding alter its established standards of public convenience and necessity without advising protesting carriers of its alteration of such standards?

4. May the Interstate Commerce Commission make findings and conclusions not supported by substantial evidence of record?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The National Transportation Policy (49 U.S.C., preceding Section 1); Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307); the Fifth Amendment to the Constitution of the United States; and 5 U.S.C. Sections 1002, 1004, 1006, 1007.

STATEMENT

On the 3d day of January, 1956, Everts' Commercial Transport, Inc., filed its application with the Interstate Commerce Commission for a certificate of public convenience and necessity to transport acids, chemicals and chemical solutions between points in Oregon, Washington and California and from points in California, Oregon and Washington to points in Idaho. The Commission assigned to such proceeding its docket number MC 25643, Sub 41. Hearing therein was held in Portland, Oregon, on May 3d and 4th, 1956.

On the 21st day of November, 1955, Inland Petroleum Transportation Company, Inc., filed with the Commission an application for a certificate of public convenience and necessity to transport acids, chemicals and chemical solutions in bulk by motor truck between points in California, Idaho, Montana, Oregon and Washington. The Commission assigned to such proceeding its docket number MC-88161, Sub 48, and the same was heard at Seattle, Washington, May 7, 1956 to and including May 12, 1956.

Each such application was denied by the hearing Examiner. Each applicant filed exceptions. These exceptions resulted in Division 1 of the Commission reversing the Examiner in each proceeding, and the grant of authority to each applicant. These Appellants and other interested parties filed petitions for reconsideration with the Commission. The Commission subsequently, and on January 19, 1959, finally decided the two identified

dockets in conjunction with nine other separate applications by one decision, which is reported in 78 M.C.C. 717.

Shortly thereafter, Appellant St. Johns Motor Express Co. instituted this proceeding in the United States District Court for the District of Oregon, and the other two Appellants were subsequently permitted to intervene.

Appellants contended before the three-judge court that there was no substantial evidence to support the Commission's findings of public convenience and necessity, which contention was recognized by the three-judge court. However, the appellants also contended in effect (1) that the Commission must consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability of existing carriers to maintain a safe, adequate, economical and efficient service; (2) that it is a violation of the due process clause of the Constitution of the United States for the Interstate Commerce Commission in deciding a proceeding to predicate findings and conclusions upon evidence not of record in the subject proceeding; and (3) that the Interstate Commerce Commission in deciding a proceeding may not alter its established standards of public convenience and necessity without advising protesting carriers of its alteration of such standards.

The three-judge court apparently gave no cognizance or attention to the latter three contentions, see Appendix A.

THE QUESTIONS ARE SUBSTANTIAL

This is a case of first impression in this Court, insofar as the first question presented is concerned. While this Court has heretofore held that all relevant factors of the National Transportation Policy must at least be considered by the Interstate Commerce Commission in every proceeding, this Court has never, to our knowledge, ruled upon the specific question as to whether as a condition precedent to granting additional operating authority the Commission must consider, give weight to, and make findings as to whether the grant of such additional operating authority will impair the ability of existing carriers to maintain a safe, adequate, economical, and efficient service.

As will appear, infra, this Court has specifically held that

(a) Due process requires regulatory commissions to predicate findings and conclusions only upon matters of record, and

(b) Agencies may from time to time change their standards, but a party relying upon previously established standards should have an opportunity to meet revised standards if, without notice, the agency determines upon new and altered standards.

However, this Court has never, to our knowledge, passed upon these questions in the context which we have here. It would appear that both the Commission and the Court either (a) failed to correctly interpret this Court's

decisions on the latter two questions, or (b) ignored this Court's decisions relative thereto.

The proper resolution of the first question is of vital significance to the entire transportation industry and to the general public in that the existing transportation system cannot be sound and economical, and continue to exist, if no heed is to be given to the Congressional directive that a sound and economic transportation system shall be maintained, as voiced in the National Transportation Policy.

The National Transportation Policy specifies that the purpose of the Interstate Commerce Act, in part, is:

> " * * * to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers."

However, the Commission in the proceeding made no finding as to whether the grant of the additional authorities would, or would not, have any effect upon the existing transportation system. It ignored the subject.

This Court in *Schaffer Transportation Co., et al, v. U. S.*, 355 U.S. 83 stated at page 85:

> "The National Transportation Policy formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc. v. United States*, 351 U.S. 56; *Eastern-Central Motor Carriers Ass'n. v. United States*, 321 U.S. 194; *McLean Trucking Co. v. United States*, 321 U.S. 67. Of course, the Commission possessed a

'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker*, 326 U.S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. *Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.*" (emphasis supplied)

This Court has similarly held that all relevant factors of the National Transportation Policy must at least be considered by the Commission. *American Trucking Association v. United States*, 344 U.S. 313-314; *King v. United States*, 344 U.S. 254, 263-264; *Alabama G. S. R. Co. v. United States*, 340 U.S. 419, 434-436; *United States v. Rock Island Co.*, 340 U.S. at 226-228.

The Interstate Commerce Commission is a creature of statute. This Court has repeatedly held, that the Commission must make clear findings of each element essential to the exercise of power. *North Carolina v. United States*, 325 U.S. 507; *United States v. Chicago, Milwaukee, St. P & P*, 294 U.S. 499, 510, 511; *Interstate Commerce Commission v. New York Central*, 222 U.S. 506.

The Commission itself has recognized the pertinency of its need to discuss the existing services in many cases. For example, in *Smith & Solomon Trucking Co., Extension—Camden*, 61 M.C.C. 748, it held at page 752:

> "There is one other aspect of this type of case which requires consideration. *The declared transportation policy requires us to foster sound economic conditions in transportation.* We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, *on the existing competitive situation in the considered territory.* In the absence of inadequacy of existing service, to permit a carrier to follow individual traffic which he controls can create a potential competition for existing carriers which is dangerous. *In every extension application we must look to the existing transportation scheme and determine what effect, if any, an extension will have on present facilities and operating authorities.* We may not, within our present powers, refuse to recognize the rights of existing carriers already operating in the considered area." (emphasis ours)

This holding was upheld in *Smith & Solomon Trucking Co. v. United States*, 120 Fed. Supp. 277, where it was stated:

> " * * * The national transportation policy which the Commission had very much in mind and which is of vital importance in any decision on the instant type of transportation problem does make it mandatory on the Commission, as the latter states, 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation. * * * "

It may be that the Commission will urge here that it could have made the required finding of non-impairment of existing services. We do not concede this. But it

would appear immaterial at this stage. In *Securities & Exchange Commission v. Cheney Corporation*, 318 U.S. 80, this Court stated:

> " * * * The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. Compare United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510, 511, 55 S. Ct., 462, 467, 79 L. Ed. 1023. There is no such finding here."

It is well established that it is a general rule of law that nothing can be treated as evidence that is not introduced as such. *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U.S. 88, 91, 93; *Chicago Junction Case*, 264 U.S. 258; *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274; *Morgan v. United States*, 298 U.S. 468.

Regardless of this well-established rule of due process, the Commission here considered 11 applications, overlapping in varying degrees, conjunctively. They covered generally the area of the 11 Western States. These were heard on separate records and at different times. Some applicants had 3 witnesses; other had as high as 26 witnesses. Some records reflect testimony covering several states; other records reflect testimony covering as few as two states. These appellants were parties to some of the proceedings, but were not parties to others of the proceedings. The decision reflects an arbitrary division of the total area so that two additional carrier services were made available within, to, and from, each state.

As to evidence in proceedings in which appellants were not protestants, they obviously had no day in Court.

It is recognized that the Commission has the right, within the limits of its power, to change its policies, but if policies are changed, parties to proceedings before it should have advance notice of such change. See *Securities Exchange Commission v. Cheney Corporation*, 318 U.S. 80, 89; *E. Brooks Matlack, Inc. v. U. S.*, 119 Fed. Supp. 617.

In *Morgan v. U. S.*, 304 U.S. 1, it was held:

> " * * * But a 'full hearing'—a fair and open hearing—required more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command. * * *
>
> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the 'highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Here, the Appellants went into the instant proceedings relying upon the standards of public convenience and necessity theretofore long established by the Commission. Their evidence was directed to, and in reliance upon, such standards; yet, the Commission ignored the following elements of public convenience and necessity:

(a) The burden upon each applicant to establish a definite and continuing present or future need for the service proposed;

(b) The question of impairment or destruction of existing services and their service to the public

It is respectfully submitted that the revisal of the usual and accepted standards of public convenience and necessity without notice to these Appellants constituted denial of due process and that at least a new and further hearing to enable Appellants to adjust their cross-examination and presentment of evidence to the new standards should be provided.

CONCLUSION

For the reasons stated, we believe that each question presented by this appeal is so substantial, and is of such public importance, as to require plenary consideration, with briefs and oral argument, for the resolution of the same.

Respectfully submitted,

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August 13, 1959.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ST. JOHNS MOTOR EXPRESS CO., a corporation, Plaintiff, and JAMES J. WILLIAMS, INC., and CONSOLIDATED FREIGHTWAYS, INC., Intervening Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, EVERTS COMMERCIAL TRANSPORT, INC., and INLAND PETROLEUM TRANSPORTATION COMPANY, INC., Intervening Defendants.	)	Civil No. 72-59 OPINION April 27, 1959

Before MATHEWS, Circuit Judge, and MATHES and SOLOMON, District Judges.

PER CURIAM:

The principal issue involved in this case is one of fact. Plaintiff contends that there is no substantial evidence to support the Commission's findings of public convenience and necessity in granting the applications of Everts' Commercial Transport, Inc., and Inland Petroleum Transportation Company, Inc.

We have examined the Report of the Commission and conclude that the findings are amply supported.

Accordingly, the findings of fact and conclusions of law set forth in the Report of the Commission as to Docket No. MC-25643 (Sub-No. 41), entitled *Everts Commercial Transport, Inc., Extension—Bulk Commodities,* and Docket No. MC-88161 (Sub-No. 48), entitled *Inland Petroleum Transportation Co., Inc., Extension—Bulk Commodities,* are hereby confirmed and adopted as the findings of the court, and judgment thereon will be entered dismissing the action.

/s/ Clifton Mathews
Circuit Judge

/s/ Wm. C. Mathes
District Judge

/s/ Gus J. Solomon
District Judge

Endorsed:
Filed April 27, 1959
R. DeMott, Clerk
By T. Lund, Deputy

A TRUE COPY
R. DE MOTT, CLERK
By THORA LUND /s/
Deputy
(SEAL)